INTERIOR BOARD OF INDIAN APPEALS

Sharon Eaton v. Aberdeen Area Director, Bureau of Indian Affairs

28 IBIA 283 (11/22/1995)

Related Board cases:
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# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

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| SHARON EATON, Appellant | : | Order Affirming Decision |
| v. | : | |
| | : | Docket No. IBIA 95-56-A |
| ACTING ABERDEEN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee | : | November 22, 1995 |

This is an appeal from an October 28, 1994, decision of the Acting Aberdeen Area Director, Bureau of Indian Affairs (Area Director; BIA), affirming the assessment of damages for livestock trespass on range unit 332 on the Cheyenne River Sioux Reservation. For the reasons discussed below, the Board affirms the Area Director's decision.

Appellant held a grazing permit for range unit 332 for a term ending October 31, 1993. She applied for, but did not receive, a permit for a five-year term beginning November 1, 1993, and ending October 31, 1998. 1/ Because her permit expired on October 31, 1993, she was required to remove her cattle from the range unit by that date. She did not do so. On November 19, 1993, the Superintendent, Cheyenne River Agency, BIA, wrote to appellant, stating that, unless her cattle were removed by 5:00 pm on December 3, 1993, they would be considered to be in trespass.

On December 7, 1993, Agency personnel observed 166 of appellant's cattle on the unit. On December 8, 1993, the Superintendent again wrote to appellant, stating:

> You have **SEVENTY-TWO (72) HOURS FROM RECEIPT OF THIS NOTICE** to remove any and all livestock owned by you from the above mentioned Range Unit, or make other satisfactory arrangements with the Branch of Land Operations [of the Agency]. Failure to do so will result in assessing the penalties provided for in 25 CFR 166.24. These penalties may include impoundment of your livestock. [Emphasis and capitals in original.]

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1/ Appellant and several others appealed from the denial of their applications for grazing permits. The appeals ultimately reached the Board, which consolidated the cases and placed the Area Director's decisions into immediate effect in early 1994. Appellant's notice of appeal was received by the Board on Jan. 13, 1994, and the Area Director's decision in her case was placed into immediate effect on Jan. 18, 1994.

On Feb. 9, 1995, most of the appeals, including the one filed by appellant, were dismissed for failure to exhaust tribal remedies. Hunt v. Aberdeen Area Director, 27 IBIA 173 (1995).

The Superintendent's December 8, 1993, letter was sent to appellant by certified mail, but appellant failed to claim it, and it was eventually returned to the Agency. The Superintendent took no further action against appellant until after January 18, 1994, when, as noted in footnote 1, supra, the Area Director's decision concerning appellant's grazing permit application was put into immediate effect.

On January 24, 1994, BIA personnel inspected range unit 332 and found 126 of appellant's cattle in trespass. On January 25, 1994, BIA personnel hand-delivered a trespass notice to her. The following day, another BIA inspection found 155 of her cattle on the range unit. On January 28, 1994, appellant removed her cattle from the unit. 2/

On February 2, 1994, the Superintendent wrote to appellant, enclosing a bill for trespass covering the period November 1, 1993, to January 28, 1994. His letter explained:

> The penalty fees due on the Bill for Collection have been calculated as stipulated in 25 CFR 166.24. You are being assessed $1.00/head in trespass together with the reasonable value of forage consumed based upon the average rate received per month for comparable grazing privileges on the reservation. Following is how this was calculated:
>
> a = $1.00/head
> b = reasonable value of forage consumed per head ($7.80/AUM (1994 appraised rate) X 12 months = $93.60/year divided by 365 days = $0.26/day/head)
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> |---|---|---|---|
> | a) $1.00/head X 155 head | | = | $ 155.00 |
> | b) $0.26/head/day x 155 head x 89 days | | = | $3,586.70 |
> | c) a + b | TOTAL | = | $3,741.70 |

(Superintendent's Feb. 2, 1994, Letter at 1-2).

Appellant did not pay the bill. On July 18, 1994, the Superintendent sent another bill, adding fees, interest, and penalties for late payment, for a total of $3,905.11.

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2/ Appellant contends that she received notice by personal delivery on Jan. 21, 1994, and removed her cattle on Jan. 23, 1994. She submits no support for these dates, other than a contention that "[s]uch removal can be verified by [appellant], her family and the trucker hired to haul the cattle away from the range unit" (Appellant's Notice of Appeal at 3 n.2).

The record includes a receipt for BIA's hand-delivery of the trespass notice. The receipt is dated Jan. 25, 1994, and bears appellant's signature. BIA field reports show that appellant's cattle were observed on the range unit on Jan. 24 and 26, 1994. In light of this evidence and appellant's failure to produce any evidence for her dates, the Board accepts BIA's dates as accurate.

Appellant's attorney wrote to the Superintendent about the bill on July 19, 1994. The Superintendent responded on July 27, 1994, describing the history of the matter and stating that the delinquent bill was required to be paid in full. Appellant's attorney wrote again on August 4, 1994, and the Superintendent responded on September 14, 1994, again confirming the trespass bill and stating that his decision could be appealed. 3/

Appellant appealed to the Area Director, who affirmed the Superintendent's decision on October 28, 1994.

On appeal to the Board, appellant contends that, because 25 CFR 166.24(c) requires BIA to serve notice of trespass by certified mail or personal delivery, it would be a violation of her right to due process to assess trespass damages against her for any time prior to January 25, 1994.

25 CFR 166.24(c) provides in relevant part:

> Notice and order to remove. (1) When it has been determined that a violation exists and the owner of the unauthorized livestock is known, written notice shall be served upon the alleged violator or his agent by certified mail with return receipt requested, or personal delivery and a copy of the notice shall be sent to any known lien holder. The notice shall set forth the act constituting the violation, the legal description of the land where the livestock were observed, the verification of brands in the State Brand Book, and the regulation alleged to have been violated. The notice shall also instruct the alleged violator to remove the livestock within a specified time, allow a specified time from receipt of the notice to show that there has been no violations [sic], or to make settlement under § 166.24(d). If the alleged violator fails to comply with the notice, the Superintendent may impound the livestock under § 166.24(f).

Appellant does not deny that she received the Superintendent's November 19, 1993, letter, which was sent to her by regular mail. In fact, she specifically stated in a complaint she filed in Federal court that she had received the notice. Eaton v. Babbitt, Civ. No. 93-3041, dismissed for failure to join an indispensable party (D.S.D. April 14, 1994). Nor does appellant deny that the Superintendent sent his December 8, 1993, notice to her by certified mail. Appellant's argument appears to be that, even though she admittedly received notice that she was in trespass, and even though the Superintendent sent his December 8, 1993, notice to her by certified mail, she cannot be held liable for trespass damages prior to January 25, 1994, because she did not accept service until that date.

This argument reflects a fundamental misunderstanding of 25 CFR 166.24 in general and of subsection 166.24(c) in particular.

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3/ Neither the attorney's July 19, 1994, letter nor his Aug. 4, 1994, letter is included in the record. In her appeal to the Board, appellant states that her request to the Superintendent was that he reduce her trespass bill.

25 CFR 166.24(a) prohibits unauthorized grazing on Indian land, and subsection 166.24(b) requires that the Superintendent collect penalties and damages for such trespasses. 4/ The Superintendent's duty to collect penalties and damages under this provision is mandatory. Kimmet v. Billings Area Director, 22 IBIA 148, 151 (1992); Kimmet v. Billings Area Director, 19 IBIA 72, 75 (1990). This duty derives from the trust responsibility of the United States for the protection of Indian property. In this case, the trust responsibility requires that BIA, on behalf of the Indian owners of the land included in range unit 332, seek compensation for the unauthorized use of that land. 5/

As appellant contends, subsection 166.24(c) requires that BIA provide notice to alleged trespassers by certified mail or personal delivery. The purpose of this notice requirement is, as clearly stated in the provision, to allow a trespasser an opportunity to show that he/she was not in trespass, to remove the trespassing livestock, and/or to make settlement for the trespasses by paying accrued penalties and damages. Where the trespasser fails to take any of these steps, BIA is authorized to proceed further against him/her, in accordance with subsections 166.24(e) - (j) 6/

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4/ 25 CFR 166.24(b) provides:

"Unauthorized grazing. The owner of any livestock grazing in trespass on trust or restricted Indian lands is liable to a penalty of $1 per head for each animal thereof for each day of trespass (except in * * * South Dakota * * * where the penalty shall be $1 per head of cattle regardless of the number of days of trespass), together with the reasonable value of the forage consumed by their [sic] livestock and damages to property injured or destroyed, and for expenses incurred in impoundment and disposal. The Superintendent shall take action to collect all such penalties and damages, reimbursement for expenses incurred in impoundment and disposal, and seek injunctive relief when appropriate. All payments for such penalties and damages shall be credited to the landowners where the trespass occurs except that the value of forage or crops consumed or destroyed may be paid to the lessee of the lands not to exceed the rental paid, and reimbursement for expenses incurred in impoundment and disposal shall be credited as appropriate."

5/ The Board has held on several occasions that the trust responsibility, as it concerns a particular tract of land, is to the Indian landowners, not to a person doing business with the Indian landowners, even if that person is also Indian. E.g., Candelaria v. Sacramento Area Director, 27 IBIA 137 (1995); Johnson v. Acting Phoenix Area Director, 25 IBIA 18 (1993). The same is true where the other person is an alleged trespasser.

6/ Further action in a case such as appellant's--where the trespassing livestock have been removed but settlement has not been made--is described in subsection 166.24(e). This subsection requires that a demand for immediate payment be sent to the trespasser by certified mail or personal delivery, before the matter is referred to the Department of Justice.

Proceedings in this matter appear to have reached the point described in subsection 166.24(e). Therefore, should appellant continue to refuse to make payment, BIA must next send the demand letter called for in this subsection.

The regulations make clear that BIA may not take these further enforcement actions until it gives the notice described in the regulations. But trespass penalties and damages accrue, not because of any BIA enforcement action, but because the trespasser, having made unauthorized use of Indian land, is obligated to compensate the landowners for that unauthorized use. Penalties and damages begin to accrue at the time the trespass is initiated and continue to accrue as long as the trespass continues. This is made clear in subsection 166.24(b), quoted in footnote 4, supra.

The Board affirms the Area Director's holding that appellant is liable for trespass penalties and damages for the period November 1, 1993, to January 28, 1994.

Appellant also contends that, even if she is liable for damages, the damages assessed against her should be reduced because the trespasses occurred during the winter. She continues: "[T]he range grass was at best of minimal value during the period or at worst unavailable due to snow cover. [Appellant] should not be forced to pay the value of spring or summer grass rates for a period in the dead of winter" (Appellant's Notice of Appeal at 6).

Appellant does not contend that she provided her cattle with winter feed during the time they were in trespass on range unit 332. Her argument suggests that her cattle simply did not feed, or fed very sparingly, during that time. The Board finds this contention incredible.

25 CFR 166.24(d) provides:

> The amount due the Indian landowner and/or the United States in settlement for unauthorized grazing use shall be determined by the Superintendent as follows:
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> * * * * * *
>
> (2) A reasonable value of forage consumed based upon the average rate received per month for comparable grazing privileges on the reservation for the kind of livestock concerned, or the estimated commercial value for such privileges if no comparable grazing privileges are sold.

Appellant's damages were calculated in accordance with this provision. Appellant has not shown error in BIA's calculation.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's October 28, 1994, decision is affirmed.

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| Anita Vogt | Kathryn A. Lynn |
| Administrative Judge | Chief Administrative Judge |